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Rosli bin Hamzah v Public Prosecutor

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HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42–3 OF 2007
YEOH WEE SIAM JC
2 NOVEMBER 2009

C

Criminal Law — Penal Code — s 408 — Criminal breach of trust — Chief cashier of bank misappropriating cash in transit — Ingredients to be proved to establish charge under s 408 — Whether criminal breach of trust established beyond reasonable doubt

D

Criminal Procedure — Charge — Framing or particulars of — Whether amended charge prejudicial to accused — Whether amended charge read and explained and understood by accused

E

Criminal Procedure — Sentence — Criminal breach of trust — Sentenced to four years imprisonment and two strokes of whipping — Deterrence — Whether sentence adequate

F

Criminal Procedure — Trial — Close of prosecution's case — Standard of proof applicable — Whether offence taking place before amendment to s 173(f) of the Criminal Procedure Code — Whether misdirection by trial judge curable

G

The appellant, was charged under s 408 of the Penal Code in relation to cash in transit amounting to RM450,000 which had been entrusted to him as the chief cashier at Bank Bumiputra. At the close of the case for the prosecution, the trial judge held that the prosecution had established a prima facie case and called for the defence. At the close of the case for the defence, the trial judge held that the defence did not raise any reasonable doubt on the prosecution. The appellant was convicted and sentenced to four years imprisonment and two strokes of whipping. The appellant appealed against his conviction and sentence. The appellant was initially charged for criminal breach of trust involving RM1.3m which was amended to RM450,000. Learned counsel submitted that the prosecution was very inconsistent in the way it handled the prosecution. It was also claimed that both SP5 and SP10 (manager and deputy manager of the appellant) were interested witnesses and disciplinary action had been taken against them by the bank.

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I

Held, dismissing the appeal against conviction and sentence:

(1) The trial judge erred in law in applying the test of whether a prima facie case had been established by the prosecution at the close of the case for the prosecution. The offence took place on 27 June 1996 ie before s 173(f) of the Criminal Procedure Code ('CPC') was amended on 31 January 1997 to provide that the standard of proof required of the prosecution at the close of the case for the prosecution was based on prima facie test. Therefore, the standard of proof applicable in this case was proof beyond reasonable doubt at the close of the case by the prosecution (see para 13).

(2) Notwithstanding the misdirection of the trial judge in applying the wrong standard of proof at the close of the case for the prosecution, the court can still evaluate the evidence and findings of the trial judge to determine whether the prosecution had proved its case beyond reasonable doubt in order for the defence to be called. The error of the trial judge in applying the prima facie test is curable under s 422 of the CPC. Upon a perusal of the notes of evidence, such a misdirection by the trial judge had not occasioned a failure of justice. The appellant knew exactly the offence that he was charged with and he had a full and fair trial (see paras 14 & 17); *Public Prosecutor v Ishak Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 851 followed.

(3) The trial judge correctly stated that to prove the charge under s 408 of the Penal Code, the following ingredients have to be proved: (i) that the appellant was the clerk or servant of the BBMB; (ii) that as such, the appellant was entrusted with the property in question or had dominion over it; and (iii) that he committed criminal breach of trust in respect of it. At the close of the case for the prosecution, the prosecution had sufficient evidence to prove the case beyond reasonable doubt against the appellant (see paras 18 & 50).

(4) The defence did not raise any reasonable doubt on the prosecution's case to rebut it. In the absence of a reasonable explanation from the appellant on the money, the prosecution had proved beyond reasonable doubt that the appellant committed criminal breach of trust of the RM450,000 belonging to his employer (see para 65).

(5) The public prosecutor has the discretion to prosecute and to conduct the prosecution, and it is not for the court to instruct the public prosecutor on how the charge should be framed or how the prosecution should be conducted. As long as the amended charge was read and explained to the appellant and he understood it, and was given the opportunity to state his plea, there was no prejudice caused to the appellant, more so when the amount in the charge was reduced from RM1.3m to RM450,000 (see para 69).

A (6) The sentence imposed by the trial judge was adequate and appropriate. The sentence should serve as a deterrent not only to the appellant, but also to others in the banking industry who are entrusted with funds by members of the public for safekeeping (see para 96).

B **[Bahasa Malaysia summary**

Perayu telah dituduh di bawah s 408 Kanun Keseksaan berkaitan dengan transit tunai berjumlah RM450,000 yang telah diamanahkan kepadanya sebagai ketua juruwang di Bank Bumiputra. Di penutup kes pendakwaan, C hakim perbicaraan memutuskan bahawa pembelaan tidak menimbulkan apa-apa keraguan munasabah ke atas pihak pendakwaan. Perayu telah disabitkan dan dijatuhkan hukuman empat tahun penjara dan dua kali sebatan. Perayu telah merayu terhadap sabitan dan hukuman tersebut. Perayu pada mulanya telah dituduh atas pecah amanah jenayah membabitkan D sejumlah RM1.3 juta yang mana telah dipinda kepada RM450,000. Peguam yang bijaksana berhujah bahawa pihak pendakwaan amat tidak konsisten dengan cara pengendalian pendakwaannya. Ia juga mendakwa bahawa kedua-dua SP5 dan SP10 (pengurus dan penolong pengurus perayu) merupakan saksi-saksi berkepentingan dan tindakan tatatertib telah diambil E terhadap mereka oleh pihak bank.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

F (1) Hakim perbicaraan khilaf dari segi undang-undang apabila menggunakan ujian sama ada kes prima facie telah dibuktikan oleh pihak pendakwaan di penutup kes pendakwaan. Kesalahan tersebut berlaku pada 27 Jun 1996 iaitu sebelum s 173(f) Kanun Prosedur Jenayah ('KPJ') dipinda pada 31 Januari 1997 bagi memperuntukkan G bahawa piawai bukti yang dikehendaki daripada pihak pendakwaan di penutup kes pendakwaan adalah berdasarkan ujian prima facie. Oleh itu, piawai bukti yang terpakai dalam kes ini adalah pembuktian melampaui keraguan munasabah di penutup kes oleh pihak pendakwaan (lihat perenggan 13).

H (2) Meskipun hakim perbicaraan telah salah arah dalam menggunakan piawai bukti yang salah di penutup kes pendakwaan, mahkamah masih boleh menilai bukti dan penemuan hakim perbicaraan untuk menentukan sama ada pihak pendakwaan telah membuktikan kesnya I melampaui keraguan munasabah bagi tujuan pembelaan dipanggil. Kesilapan hakim perbicaraan menggunakan ujian prima facie boleh diperbaiki di bawah s 422 KPJ. Setelah meneliti nota-nota keterangan, salah arah oleh hakim perbicaraan tidak mengakibatkan kegagalan keadilan. Perayu maklum tentang kesalahan yang dipertuduhkan dan

dia mendapat perbicaraan yang penuh dan adil (lihat perenggan 14 & 17); *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ diikut.

(3) Hakim perbicaraan dengan betul telah menyatakan bahawa untuk membuktikan pertuduhan di bawah s 408 Kanun Keseksaan, faktor-faktor tersebut perlu dibuktikan: (i) bahawa perayu merupakan kerani atau pekerja BBMB; (ii) bahawa oleh demikian, perayu diamanahkan dengan harta yang dipersoalkan atau mempunyai dominion ke atasnya; dan (iii) bahawa dia telah melakukan pecah amanah jenayah sehubungan dengannya. Di penutup kes pendakwaan, pihak pendakwaan mempunyai keterangan yang mencukupi untuk membuktikan kes melampaui keraguan munasabah terhadap perayu (lihat perenggan 18 & 50).

(4) Pihak pembelaan tidak menimbulkan apa-apa keraguan munasabah ke atas kes pendakwaan untuk mematahkannya. Dengan ketiadaan penjelasan yang munasabah daripada perayu tentang wang tersebut, pihak pendakwaan telah membuktikan melampaui keraguan munasabah bahawa perayu telah melakukan pecah amanah jenayah sejumlah RM450,000 milik majikannya (lihat perenggan 65).

(5) Pendakwa raya mempunyai budi bicara untuk mendakwa dan mengendalikan pendakwaan, dan mahkamah tidak harus mengarahkan pendakwa raya bagaimana pertuduhan patut dibuat dan bagaimana pendakwaan patut dikendalikan. Asalkan pertuduhan yang dipinda telah dibaca dan dijelaskan kepada perayu dan dia memahaminya, dan diberikan peluang untuk menyatakan rayuannya, maka tiada prejudis diakibatkan kepada perayu, lebih-lebih lagi apabila jumlah dalam pertuduhan telah dikurangkan daripada RM1.3 juta kepada RM450,000 (lihat perenggan 69).

(6) Hukuman yang dikenakan oleh hakim perbicaraan adalah mencukupi dan wajar. Hukuman tersebut patut dianggap sebagai pencegahan bukan hanya kepada perayu, tetapi juga kepada yang lain dalam industri perbankan yang diamanahkan dengan wang orang awam untuk disimpan dengan selamat (lihat perenggan 96).]

Notes

For cases on close of prosecutions's case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4644–4707.

For cases on criminal breach of trust, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3520–3534.

For cases on framing or particulars of, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1162–1261.

For cases on s 408 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1837–1852.

Cases referred to

Bahruni bin Ismail v Pendakwa Raya [1997] 2 MLJ 265, FC (refd)
PP v Ishak Hj Shaari & other appeals [2003] 4 MLJ 585; [2003] 3 CLJ 851, CA (folld)

Legislation referred to

Criminal Procedure Code ss 173(f), 422
Penal Code s 408

V Kumaresan (Huang Khairun Kumar & Associates) for the appellant.
Isa bin Hassim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Yeoh Wee Siam JC:

[1] This appeal is in respect of the decision of the learned sessions court judge, Petaling Jaya ('the trial judge') regarding Sessions Court Arrest Case No 62–53 of 1998.

[2] Rosli bin Hamzah ('the appellant') was charged as follows:

> Bahawa kamu pada 27 Jun 1996 di Bank Bumiputra Malaysia Bhd Cawangan Kelana Jaya di dalam Daerah Petaling, dalam Negeri Selangor sebagai Ketua Juruwang telah diamanahkan dengan harta wang tunai berjumlah RM450,000 yang merupakan Cash in Transit atas sifat kamu sebagai Ketua Juruwang telah melakukan kesalahan di bawah Seksyen 408 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[3] At the close of the case for the prosecution, the trial judge held that the prosecution had established a prima facie case against the appellant. She therefore called for the defence.

[4] At the close of the case for the defence, the trial judge held that the defence did not raise any reasonable doubt on the prosecution case. She therefore found the appellant guilty as charged and convicted him.

[5] The appellant was sentenced to four years imprisonment and two strokes of whipping.

[6] This appeal by the appellant is regarding his conviction and sentence. Currently, the appellant is on bail pending the appeal.

[7] I heard the appeal on 30 October 2009 after which I gave my decision on the same day.

BRIEF FACTS

[8] The appellant was a chief cashier at Bank Bumiputra Malaysia Sdn Bhd ('BBMB'), Kelana Jaya branch, Petaling Jaya, Selangor.

[9] On 27 June 1996, three cash in transit transactions ('CIT') were sent out from the BBMB Kelana Jaya branch to:

(a) BBMB Damansara Utama branch, the sum of RM235,000;

(b) Bank Negara Malaysia, through the BBMB Shah Alam branch, the sum of RM329,000; and

(c) BBMB Section 14 Petaling Jaya ('Section 14 PJ') branch, the sum of RM450,000.

[10] The transactions in (a) and (b) above went through smoothly and the sums were received by the branches concerned. However, the sum of RM450,000 for the transaction to the Section 14 PJ branch, in (c) above, was not received by that branch.

[11] In the domestic inquiry held by the bank, the appellant was alleged to have caused the disappearance or loss of the RM450,000. Two copies of debit advice which accompanied the RM450,000, at the time when the money was supposed to be sent, were alleged to have been amended by the appellant in his own handwriting. Through the amendment, in the column for 'Cawangan yang dihantar', the words 'Section 14, Petaling Jaya' had been changed to 'Shah Alam'. The amendment was initialled by the appellant.

[12] More than two years after that, the accused was arrested by the police and charged in the Petaling Jaya Sessions Court on 26 September 1998.

STANDARD OF PROOF

[13] With respect, the trial judge erred in law in applying the test of whether a prima facie case has been established by the prosecution at the close of the case for the prosecution. The offence took place on 27 June 1996 ie before s 173(f) of the Criminal Procedure Code ('the CPC') was amended on 31 January 1997 to provide that the standard of proof required of the prosecution at the close of the case for the prosecution is one based on the

A prima facie test. That being the case, therefore, the standard of proof applicable in this case is proof beyond reasonable doubt at the close of the case by the prosecution.

B **[14]** Notwithstanding the misdirection of the trial judge in applying the wrong standard of proof at the close of the case for the prosecution, this court, in its appellate jurisdiction would still evaluate the evidence and findings of the trial judge to determine whether the prosecution has proved its case beyond reasonable doubt at the close of the case for the prosecution in order that the defence be called. This is consistent with the principles laid C down in the following two Court of Appeal cases.

[15] In *Bahruni bin Ismail v Pendakwa Raya* [1997] 2 MLJ 265, the main ground of appeal was that the judge erred in not holding that the prosecution was bound by law to prove a case beyond reasonable doubt at the close of the D case for the prosecution. It was held, inter alia, as follows:

(1) The law on the standard of proof required of the prosecution at the close of its case was settled and that was beyond a reasonable doubt.

E ... Therefore, there was a clear misdirection on the standard of proof and the judge ought not to have called upon the appellant to enter into his defence on the trafficking charge. Thus, the conviction under s 39B(1)(a) of the Act must be quashed;

F … *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289 followed and *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 not followed.

(2) Applying the standard of proof of beyond reasonable doubt, at the G close of the case for the prosecution, there were overwhelming evidence of possession of the drug in question, coupled with the admission of the appellant. Therefore, a conviction under s 39A(2)(a) of the Act was substituted.

H **[16]** In *Public Prosecutor v Ishak Hj Shaari & other appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 851 it was held:

On 27 July 1996, *Arulpragasan*'s case decided that the standard of proof required from the prosecution at the close of its case was beyond all reasonable doubt I standard of proof ... That was based on the then existing provisions of s 173(f) of the CPC.

However, the section was amended providing for the prima facie standard of proof at the close of the case for the prosecution, which took effect from 31 January 1997 … As such, the law prior to the amendment as established in *Arulpragasan*'s case

applied to the instant appeals. That being the case, the prima facie standard of proof applied by the trial courts at the close of the prosecution case are clearly misdirections of law on the standard of proof. In our view, the misdirections are to be regarded as errors in the judgments for the purpose of s 422 of the CPC … Therefore, the errors in the judgments in the form of a misdirection on the standard of proof in these appeals should not be struck down automatically as illegalities, or as it were, by rule of thumb without first considering whether the accused has had a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice and thereafter, to decide whether the misdirection has occasioned a failure of justice otherwise the intention of Parliament in enacting s 422 is defeated. We prefer to approach the misdirection for the purpose of s 422 of the CPC in this manner.

[17] Following the principle in *Public Prosecutor v Ishak Hj Shaari & other appeals*, I am of the view that the error of the trial judge in applying the prima facie test is curable under s 422 of the CPC. Upon a perusal of the notes of evidence of the case before the trial judge, I do not think that such a misdirection by the trial judge has occasioned a failure of justice. The appellant knew exactly the offence that he was charged with and I believe he had a full and fair trial.

INGREDIENTS OF THE OFFENCE

[18] The trial judge was correct in stating that in order to prove the charge under s 408 of the Penal Code, the following ingredients have to be proved:

(i) that the appellant was the clerk or servant of the BBMB or employed as such;

(ii) that as such, the appellant was entrusted with the property in question or has dominion over it; and

(iii) that he committed criminal breach of trust in respect of it.

CASE FOR THE PROSECUTION

Ingredient (i)

[19] The trial judge correctly found that at the material time, the appellant was the chief cashier of the BBMB, Kelana Jaya branch, based on the evidence of SP1, SP2, SP3, SP4, SP5, SP9, SP10 and SP11 (see appeal record, in particular, pp 14–17, 18–23, 29–32, 55, 90, 114–118, 124–157, 160–183 and 184–215).

[20] Ingredient (i) of the offence was therefore proved by the prosecution ie the appellant was employed by the BBMB as its chief cashier at the Kelana Jaya branch.

Ingredient (ii)

[21] The prosecution proved that the appellant was entrusted with BBMB's property ie the sum of RM450,000 and had dominion over it, as follows:

[22] SP2, the manager of BBMB Kelana Jaya branch, who lodged the police reports, P9 and P10, confirmed that the appellant, being the chief cashier, had the responsibility of taking care of the bank's money, taking out money and receiving money. The appellant was also in charge of managing the cash in transit transactions ('CIT') ie to get ready the money and the debit advice for movement of the money from branch to branch. The appellant also had to deal with the security guard for the purpose of sending out or receiving money.

[23] SP10, the deputy bank manager, testified that he ('SP10'), SP5 ('the bank manager') and the appellant had to open the strong room and take out money for distribution to tellers who work at the counter and in the afternoon to put them back again in the strong room.

[24] According to SP10, on 27 June 1996, there were three CIT outward transactions ie:

(a) one CIT to the BBMB Damansara branch for RM235,000;

(b) one CIT to the BBMB Shah Alam branch for RM329,000; and

(c) one CIT to the Section 14 PJ branch for RM450,000.

[25] SP10 stated that the appellant's duty was to prepare the debit advice, P34A and P34B ('CA30A-2 and CA30A-3') for the purpose of sending the CIT sum of RM450,000 from the BBMB Kelana Jaya branch to the Section 14 PJ branch on 27 June 1996.

[26] SP5, the bank manager of BBMB Kelana Jaya branch, confirmed that the appellant was the one who prepared the debit advice for the CITs. Usually, the debit advice has to be prepared in three copies. The first copy ('CA30A-1') must be given to the security guard at the time the money is handed over to him for the branch concerned. The second copy ('CA30A-2') is the bank transaction copy and the third copy ('CA30A-3') is the bank's office copy (see P34A and P34B).

[27] SP5 confirmed that the appellant prepared P34A and P34B. SP5 also confirmed that he himself and the appellant signed on P34A and P34B.

[28] Based on the evidence of SP5 and SP10, the prosecution succeeded in proving ingredient (ii) of the offence ie the appellant was entrusted with the property or money of the employer, BBMB, and had dominion over it.

Ingredient (iii)

[29] The next issue is whether the appellant committed criminal breach of trust of the money entrusted to him ie the sum of RM450,000 which was supposed to have been sent to the Section 14 PJ branch in the CIT outward transaction from the BBMB Kelana Jaya branch on 27 June 1996

[30] SP4, the head of the audit group, conducted an internal audit and investigations at the BBMB Kelana Jaya branch when it was discovered that there was misappropriation of money in the CIT at the branches from May 1996 to July 1998 including the RM450,000 from the BBMB Kelana Jaya branch to the Section 14 PJ branch on 27 June 1996.

[31] From SP4's investigations, he found that the appellant had made amendments to P34A and P34B when the BBMB Kelana Jaya branch received a complaint from the Section 14 PJ branch that the sum of RM450,000 was not received on 27 June 1996. The appellant made an amendment in blue ink in his own handwriting by deleting the typed words 'Section 14, Petaling Jaya' and writing 'Shah Alam' instead. The appellant also amended the denominations for the sum in P34A from RM400 to RM400,000 and from RM50 to RM50,000. The appellant's initial is found near the amendments made.

[32] SP5 confirmed that when he first signed P34A, no amendments were made to P34A. The amendments were made by the appellant without reference to SP5 and without SP5's knowledge. SP5 also confirmed that he had no knowledge of the amendments made by the appellant. SP5 also confirmed the appellant's initial on P34A at the column for bank branch.

[33] SP9 testified that he received a telephone call from the Section 14 PJ branch informing him that the RM450,000 was not received by it on 27 June 1996. SP9 then referred the matter to the appellant. The appellant checked and made the amendments to P34A. According to SP9, usually the denomination and total amount of money must be typed in the debit advice but the appellant made the amendments by cancelling the original typewritten version and writing the amendments in his own handwriting in blue ink.

A **[34]** Based on the appellant's amendment, SP9 made a reversal entry. The effect of this is to show as if there was a reconciliation ie the sum of RM450,000, instead of being sent to the Section 14 PJ branch, was sent or diverted to the BBMB Shah Alam branch. However, the BBMB Shah Alam branch confirmed that it did not receive the RM450,000 from the BBMB
B Kelana Jaya branch on 27 June 1996.

[35] Until the time of the investigation by SP4, and by SP11 ('the police investigating officer'), the amount of RM450,000 was still hanging ('tergantung') and outstanding, which means the sum was lost or missing.
C The question is whether the appellant took the money or whether the security guard had collected it from the appellant on 27 June 1996 for the CIT outward transaction to the Section 14 PJ branch.

[36] According to SP5 and SP10, the bank's procedure and requirement is
D that when the money is handed over to the security guard for the CIT, the security guard must sign in acknowledgement the form, CA30A-2, accompanying the money to be sent ie on the reverse of P34A, and issue an acknowledgement slip to say that he received the money. Until the money sent is received by the receiving bank, the security guard is responsible for the
E money. In this case, based on the investigations of SP4, there was no such acknowledgement by the security guard.

[37] According to SP4, if the chief cashier does not receive a record that the
F cash is received by the branch bank, then the chief cashier is responsible. In this case, there was no security guard's acknowledgement slip. Neither did the Section 14 PJ branch report on the same day, 27 June 1996, that it did not receive the RM450,000.

G **[38]** SP4 also gave evidence that the bank's requirement is that any physical cash sent by CIT must be received on the same day that it was sent. However, for the purposes of accounting entry, the accounts sometimes would not be reconciled until after 2–29 days.

H **[39]** SP4's oral evidence and his report ('P28') confirmed that from 27 June 1996 to 14 July 1998 there were 78 fraudulent transactions amounting to RM1.3m. The first CIT was on 27 June 1996 to the Section 14 PJ branch where no physical cash was delivered to the Section 14 PJ branch. Until 31 July 1997 the total physical cash delivered to the receiving branches was short
I by RM1.3m, and this includes the RM450,000 that was never received by the Section 14 PJ branch.

[40] SP4 stated that even though sometimes it takes 2–29 days for the book entries to be reconciled and to balance the accounts, in the case of the

RM450,000, until the time of the investigations made by SP4, the accounts show that the sum is still outstanding. A

[41] According to SP4, the procedure for taking out the money from the strong room for a CIT is as follows (see pp 42–45 of the appeal record). B

[42] The chief cashier prepares the voucher or debit advice in three copies ie CA30A-1, CA30A-2 and CA30A-3. CA30A-1 is for the branch bank which is receiving the cash. CA30A-2 is for the branch bank which is sending the money ie for accounting entry at the branch. CA30A-3 is an office copy, usually kept by the chief cashier. The second copy, CA30A-2, is for computer validation. C

[43] The second copy of the voucher, CA30A-2, will be used as an accounting voucher to state the cash debit that was taken out. The chief cashier would give that voucher to the teller to make the computer validation. D

[44] In the morning, when the security guard comes to collect the money to be sent out to the branch bank, the appellant would be together with the deputy bank manager ('SP10') to open the strong room and hand over the cash to the guard. All this must be witnessed by the chief cashier, deputy bank manager and chief guard. Later, the security guard would hand over the money to the branch bank directed. E

[45] SP4 admitted that he did not investigate with the security guard as to whether he received the money from the BBMB Kelana Jaya branch on 27 June 1996. SP10 stated that for the transaction on 27 June 1996, there was a receipt from the guard, but that receipt was not produced in court. I note that the two CIT sent to the BBMB Damansara Utama branch for RM235,000 and to the BBMB Shah Alam branch for RM329,000 that were successfully sent to and received by them respectively are evidenced by the required CA30A-2 forms and CIT receipt/delivery note (see P30A, P30B, P31, P32A, P32B and P33). However, in the case of the CIT to the Section 14 PJ branch on 27 June 1996 for the RM450,000, what are exhibited are merely P34A and P34B which were amended by the appellant. No CIT receipt or delivery note by the security guard was produced as an exhibit. F G H

[46] Based on the above, I agree with the trial judge that there is an irresistible inference that the appellant was responsible for the loss of the RM450,000 which was the subject matter of the CIT on 27 June 1996. For as long as the security guard had not received the cash of RM450,000 on 27 June 1996 from the appellant, it only means that no such money had been given to the security guard on 27 June 1996. That is why the money was not received by the Section 14 PJ branch on 27 June 1996. It also explains why I

the appellant, as chief cashier, never reported to the BBMB Kelana Jaya branch the purported loss of the RM450,000 on 27 June 1996 itself.

[47] From the totality of the evidence adduced by the prosecution witnesses, in particular the evidence of SP4 and exh P28 ie the bank's internal audit division report, the following is proved by the prosecution.

[48] The appellant had manipulated the BBMB Kelana Jaya branch's outward CIT for the transaction involving RM450,000 to the Section 14 PJ branch on 27 June 1996. The debit advice ('CA30A-2') to the Section 14 PJ branch was not enclosed by any CIT security guard and there was no CIT security company receipt slip, thus indicating that no acknowledgement of cash was given by the CIT security guard for the cash consignment to the Section 14 PJ branch on that date. Nevertheless, the debit advice ('CA30A-2') was validated by the teller to account for the cash taken out from the BBMB Kelana Jaya branch as authorised by SP5 and SP10. On complaint from the Section 14 PJ branch on the outstanding CIT item in their reconciliation statement, Kamaluddin Khamis ('SP9'), the account clerk, referred the matter to the appellant. The appellant then altered CA30A-2 to change the name of the receiving branch from the Section 14 PJ branch to the BBMB Shah Alam branch. The branch made a reversal on 31 July 1996 but was unsuccessful as the debit and credit entries were generated to the BBMB Shah Alam branch instead of crediting the Section 14 PJ branch and debiting the BBMB Shah Alam branch. On 19 October 1996, the reconciliation statement section authorised manual reversal on the item after confirming with the account staff of the BBMB Kelana Jaya branch, Kamaluddin Khamis. The Section 14 PJ branch did not receive the cash of RM450,000 and the appellant was responsible for it.

[49] Going by the above, ingredient (iii) of the offence has been proved ie the appellant committed criminal breach of trust of the RM450,000 entrusted to him by the BBMB Kelana Jaya branch.

[50] At the close of the case for the prosecution, based on the evidence adduced, I was satisfied that the prosecution had sufficient evidence to prove the case beyond reasonable doubt against the appellant. The defence should be called to rebut the prosecution's case even though the trial judge had erred in applying the wrong standard of proof based on the prima facie test.

WHETHER ANY REASONABLE DOUBT HAS BEEN RAISED BY THE DEFENCE

[51] The appellant admitted that he was working as the chief cashier of the BBMB Kelana Jaya at the material time until he left the bank on 16 July 1998.

[52] The appellant agreed that, as the bank's chief cashier, he was responsible for the CIT transactions. He was the one to prepare the debit advice and inform the security guard to collect the cash for sending it over to the various branch banks. A

[53] The appellant also agreed that he was the one to count the actual physical cash which was taken out from the strong room whereas the manager and deputy manager would check the cash register book regarding the amounts taken out. B

[54] According to the appellant, the first copy of the debit advice has to be signed by his officers when the money was handed over to the security guard. This practice had to be carried out strictly. C

[55] After the money has been handed over to the security guard, the debit advice has to be given to the teller to make the computer validation. The computer validation is done by using the ID password of the manager or deputy manager. D

[56] Regarding exhs P34A and P34B, the appellant admitted that he prepared them. He also admitted making the amendments to P34A and P34B on the ground that at the beginning there was a request for money from the Section 14 PJ branch but later the request was cancelled because that branch had enough money. In view of that, the RM450,000 was then sent to the BBMB Shah Alam branch. E F

[57] According to the appellant, the entry hanged ('tergantung') at the Section 14 PJ branch because the account clerk, SP9, made a mistake in making the entry. After that, SP9 made a reversal entry to try and correct the situation, but that reversal entry was wrong. If the entry had been correct, then the money would not be hanging. G

[58] The trial judge found that the appellant was not able to give an explanation on the following matters: H

(a) At first, the appellant in his defence stated that there was no request from any branch for money. After that, the appellant changed his evidence, and stated that there was a request for money from the Section 14 PJ branch but it was later cancelled since the branch had sufficient money. The trial judge stated that the appellant took a long time to clarify this. I

I am of the opinion that taking a long time to answer in court should not be held against the appellant. What is more material is the fact that the appellant changed his line of defence in court rather quickly. When

I perused the notes of evidence, I find that the appellant started off very surely and confidently by stating that there was no request from any branch bank for money. Then he suddenly changed his line of defence and said that there was a request for money from the Section 14 PJ branch but the request was cancelled later. I find the second line of the defence hard to believe because the Section 14 PJ branch did not give any statement that they did not need the money. The evidence shows that the Section 14 PJ branch did inquire of the BBMB Kelana Jaya branch as to where the RM450,000 was since it was not received by them. That was why SP9 received a call from the Section 14 PJ branch about the matter. SP9 then referred the matter to the appellant who proceeded to amend P34A and P34B by changing the Section 14 PJ branch to the BBMB Shah Alam branch to show that the RM450,000 was meant to be sent to the BBMB Shah Alam branch and not the Section 14 PJ branch. What the appellant did is against bank procedure. All debit advice have to be typed but the appellant made the amendments in blue ink in his own handwriting. The appellant also made the amendments without reference to his two superiors, SP5 and SP10. Thus, SP5 and SP10 did not know about the amendments or that the money was diverted from the Section 14 PJ branch to the BBMB Shah Alam branch;

(b) The appellant could not remember who directed him to prepare the CIT to the Section 14 PJ branch;

(c) There was no signature in acknowledgement by the security guard which normally has to be appended on the reverse of P34A. There was also no separate receipt from the security guard to confirm that the cash was handed over to the security guard;

(d) The appellant, as chief cashier, could not explain why the money was not sent to the Section 14 PJ branch, and how the computer validation regarding P34A could be made, and how the Section 14 PJ branch knew that they did not receive the money;

(e) The appellant failed to explain why he prepared exhs P34A and P34B;

(f) There was no confirmation from the BBMB Shah Alam branch that they received the RM450,000 on 27 June 1996.

[59] If what the appellant stated is true, that when the Section 14 PJ branch did not require the money, and if the RM450,000 was instead sent to the BBMB Shah Alam branch based on the amendments made by the appellant, then the BBMB Shah Alam branch should have received the RM450,000 on 27 June 1996, but they did not.

[60] I agree with the trial judge that the defence of the appellant was not

able to give a reasonable explanation as to why P34A and P34B were prepared by him and why he made the amendments to those two debit advice, when in the first place there was no request for the RM450,000 from any branch of the BBMB.

[61] As the chief cashier, the appellant failed to explain what has happened to the RM450,000. He failed to report to his superiors, SP5 and SP10, on 27 June 1996 when the Section 14 PJ branch did not receive the money.

[62] The appellant did not do anything until the query came by telephone from the Section 14 PJ branch to SP9. When SP9 referred the matter to the appellant, the appellant amended P34A and P34B on his own initiative. Even with that amendment, the BBMB Shah Alam branch did not receive the RM450,000. The appellant also could not explain why there was no acknowledgement by the security guard on the reverse of P34A and why no receipt was given by the security guard for the RM450,000 handed over to him on 27 June 1996.

[63] The appellant was initially investigated for fraudulent transactions from 27 June 1996 to 14 July 1998 involving misappropriation of RM1.3m including the RM450,000. According to SP4, the appellant ran away from the bank when investigations on the matter commenced.

[64] The appellant was also not able to rebut the evidence of SP9 who stated that the amendments to P34A and P34B were only made by the appellant after the oral query through the telephone by the Section 14 PJ branch and by a letter dated 14 October 1996. Between SP9 and the appellant, I think SP9 is a more credible and reliable witness. The appellant cannot be believed because even his own evidence is conflicting.

[65] On the whole, I agree with the trial judge that the defence did not raise any reasonable doubt on the prosecution's case to rebut it. In the absence of a reasonable explanation from the appellant on the money, the prosecution had therefore proved beyond reasonable doubt that the appellant committed criminal breach of trust of the RM450,000 belonging to his employer, the BBMB.

ISSUES RAISED BY LEARNED COUNSEL FOR THE APPELLANT

[66] In his written submissions, learned counsel raised, inter alia, the following issues.

[67] SP2 ie the manager of the BBMB Kelana Jaya branch made a police

report on 16 July 1998 regarding the appellant's misappropriation of RM110,000 ('P9'). Subsequently, SP2 made a second police report ('P10') regarding the appellant's misappropriation of RM1.3m. The appellant was initially charged for criminal breach of trust involving RM1.3m. In the course of proceedings, the sum involved in the charge was amended to RM450,000. Learned counsel submitted that the prosecution was very inconsistent in the way it handled the prosecution.

[68] From the records, I note that on 26 September 1998 the appellant was first charged regarding the amount of RM3.257m for the same offence. On 17 April 2000 the charge was amended. Later the trial proceeded on the same charge but for the amount of RM1.3m. On 24 July 2001 in the midst of SP4's examination in chief, the charge was amended to the amount of RM450,000. I also note that initially SP4's evidence concentrated on evidence regarding the RM1.3m. After the charge was amended, SP4's evidence concentrated on evidence regarding the RM450,000, but such evidence was also given in the context of the total sum of RM1.3m that BBMB is alleging had been misappropriated. The internal audit division's report, P28, which was based on SP4's investigations, is a report on misappropriation of cash by the appellant, as chief cashier, resulting in a net loss of RM1.3m.

[69] The prosecution could have proceeded with the charge regarding the RM1.3m, but for reasons of its own, it decided to continue with an amended charge for RM450,000 only. In my opinion, the public prosecutor has the discretion to prosecute and to conduct the prosecution, and it is not for this court to instruct the public prosecutor on how the charge should be framed or how the prosecution should be conducted. The court's role is to hear the evidence adduced by the prosecution to determine whether the prosecution is able to prove a case beyond reasonable doubt against the appellant based on the amended charge even if such charge was preferred in the midst of SP4's evidence. For as long as such amended charge was read and explained to the appellant and he understood it, and was given the opportunity to state his plea (in this case, to claim trial to the amended charge), I do not think that there is any prejudice caused to the appellant, more so when the amount in the charge was reduced from RM1.3m to RM450,000.

[70] Learned counsel submitted that before the charge was amended for the last time by the prosecution, SP4 initially stated that the bank did not account for the money sent on 14 July 1998 from the BBMB Kelana Jaya branch to the Kuala Lumpur branch; and that for the 77 transactions listed in ID11 and exh P28, the bank did not suffer any physical loss of money. One of the 77 transactions referred to by SP4 was the one on 27 June 1996 which involved the RM450,000. After the charge was amended to the one

involving RM450,000 on 27 July 1996, and not RM1.3m 14 July 1998, SP4 then gave evidence that the bank's transaction on 27 June 1996 involved RM450,000 which was misappropriated by the appellant and which caused the bank such loss.

[71] From an evaluation of SP4's evidence and the internal audit division report ('P28'), I find that SP4 was not inconsistent in his evidence. Throughout his evidence, he was always referring to the overall context where RM1.3m was still a loss for the bank. When he referred to the RM450,000, he was not only referring to the physical loss of cash on the transaction day, 27 June 1996. He was also referring to the accounts of the bank which were suspended or hanging ('tergantung') from 27 June 1996 until the alleged offence was detected because the amount of RM450,000 was still outstanding to the bank in July 1998 (see P28).

[72] Learned counsel submitted that SP4 gave evidence that even though it was not according to the bank's rules where any cash sent out should be received on the same day, in practice it sometimes happened that it would take about 2–29 days for a receiving bank to receive the money that was supposed to have been sent to it on the first day.

[73] With respect, as pointed out by the prosecution, SP4 clearly stated that any physical cash sent must be sent received on the same day, according to bank procedure; only the accounting entry can sometimes be made 2–29 days later.

[74] Learned counsel then went on to submit that the RM450,000 for the 27 June 1996 transaction was actually finally intended for and received by the BBMB Shah Alam branch on 1 July.1996, just as the RM329,000 sent on 27 June 1996 was received by the BBMB Shah Alam branch. He referred to exh P38.

[75] Learned counsel also referred to the appellant's evidence in pp 237 and 238 of the appeal record where the appellant stated that the denominations of any moneys prepared on the day before could be changed or 'swapped' on the next day according to whatever denominations are required by any branch bank. He submitted that this explains any anomalies in the denominations of money.

[76] With respect, I do not agree with learned counsel's above submissions. As I had stated earlier, the RM329,000 sent to the BBMB Shah Alam branch on 27 June 1996 was received on the same day itself (see P32A, P32B and P33). There was no problem with that transaction as confirmed by SP4. The RM450,000 that was sent to the BBMB Shah Alam branch on 1 July 1996

A is definitely a different transaction from the one on 27 June 1996 which was intended for the Section 14 PJ branch because of the difference in denominations of the money involved. For the Section 14 PJ branch transaction on 27 June 1996, the denominations in typewritten form were initially:

B

$50–$400

$10–$50.

C **[77]** Later, the appellant amended the above in blue ink with his handwriting; the RM400 was cancelled and changed to RM400,000 and the RM50 was cancelled and changed to RM50,000 (see P34A at p 612 of the appeal record Vol 1).

D **[78]** However, according to SP4, for the RM450,000 CIT transaction on 1 July 1996 to the BBMB Shah Alam branch, the denominations were:

RM50 –	RM100,000
RM10 –	RM230,000
RM5 –	RM80,000
RM2 –	RM40,000
	RM450,000

E

(See also P38, appeal record p 618).

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[79] From the above, it is very clear that the RM450,000 intended for the 27 June 1996 transaction for the Section 14 PJ branch, which the appellant said was diverted to the BBMB Shah Alam branch, is not the same transaction as the one for the RM450,000 that was sent from the BBMB Kelana Jaya branch to the BBMB Shah Alam branch on 1 July 1996. The two transactions on 27 June 1996 and 1 July 1996 respectively are two totally different transactions and should not be confused by SP4's evidence that sometimes it takes 2–29 days for the accounting entries to be reconciled. The appellant's testimony that denominations of money could change according to the requirements of the receiving bank is a general and sweeping statement. From SP4, SP5 and SP10's evidence, it is confirmed that every voucher has to be signed by at least two or three persons and the appellant cannot, on his own, make changes to the denominations in his own handwriting without reference to SP5 or SP10.

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[80] Learned counsel submitted that the prosecution did not tender the first copy of P34A and P34B which should have been issued in three copies. SP4 said that such first copy was given to the police investigating officer, SP11, but SP11 did not tender it in court.

[81] From the totality of the evidence adduced, I find that there could be two inferences:

(a) there was no first copy of P34A and P34B, and only the appellant knew about it since he was the one who generated those forms; or

(b) the first copy of P34A and P34B were lost and could not be found.

[82] It is more probable that there was no first copy of P34A and P34B since the appellant was the one who prepared those forms and took the liberty to amend the forms later in ink in his own handwriting without letting SP5 and SP10 know about it. If at all there is such a first copy, it is also most probable that the appellant knows where it is since he was the chief cashier then and was in charge of those forms and liaising with the security guard on the handing over of the money for the CIT.

[83] Learned counsel submitted that SP11, the police investigating officer, did not tender the 'buku keluar wang' of the Kelana Jaya branch.

[84] Upon perusal of the notes of evidence regarding the above document, I find that there is no direct reference to such book in SP11's evidence, not even in his cross-examination. However, in pp 208 and 209 of the appeal record, in response to the last question, SP11 stated that he did not bring to court the record of moneys taken out of the strong room, if this is what learned counsel meant.

[85] Be that as it may, what is material are the vouchers in P34A and P34B. Even without the 'buku keluar wang', based on the evidence of SP4, SP5, SP9, SP10 and SP11, and exhs P28, P34A and P34, I am satisfied that the prosecution has sufficient evidence to prove its case beyond reasonable doubt on the charge against the appellant.

[86] Learned counsel submitted that based on the second copy of the CIT voucher ie P34A, there was a computer validation for the amount of RM450,000 for the money sent on 27 June 1996. The prosecution did not dispute that a computer validation can only be done if the money in issue was handed over to the security guard and witnessed by the manager/deputy manager and such validation was done using the password of the manager/deputy manager.

[87] With respect, here again I do not agree with learned counsel for the appellant on the above submission. After evaluating the evidence of SP4, SP5, SP9, SP10 and SP11, together with a careful perusal of P28, it is clear that even though the Section 14 PJ branch did not receive the RM450,000 there was a computer validation for that amount based on C30A-2. On a

A complaint from the Section 14 PJ branch on the outstanding item in their reconciliation statement, it was referred to the appellant who then altered CA30A-2 where the receiving branch was changed from the Section 14 PJ branch to the BBMB Shah Alam branch. The branch on 31 July 1996, using a voucher prepared by SP9, made a reversal but was unsuccessful as the debit B and credit entries were generated to the BBMB Shah Alam branch instead of crediting the Section 14 PJ branch and debiting the BBMB Shah Alam branch. On 19 October 1996, the reconciliation statement section authorised manual reversal on the item after confirming with SP9, Kamaluddin Khamis. The RM450,000 is believed to have been taken by the appellant since the C Section 14 PJ branch did not receive the cash (see also P28 pp 515 and 516).

[88] Learned counsel submitted that SP4 was given the task to look for the fault of the appellant. In the process, SP4 actually saw a letter on SP5's table, D a letter dated 1996. Until 1998, SP5 was not investigated regarding the letter and SP4 did not give any explanation for it.

[89] I have perused the appeal record but could not find any record of SP4 E seeing a letter on SP5's table. There is however a reference to a letter dated 14 October 1996 which was found at the Kelana Jaya branch, which was addressed to SP2, but not to SP5 (see appeal record p 84).

[90] With respect, learned counsel did not give details of that letter or how F it would clear the appellant from blameworthiness. The evidence shows that SP4 did investigate with SP2 and SP5 only on matters that are material to the transaction which is the subject matter of the charge. The absence of an explanation from SP4 regarding why he did not investigate SP2 and SP5 on the letter does not prejudice the prosecution's case.

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[91] Learned counsel submitted that both SP5 and SP10 were interested witnesses and disciplinary action was taken against them by the bank.

H **[92]** Upon going through the evidence of SP5 and SP10, I am of the opinion that SP5 and SP10 witnesses are truthful and credible witnesses. They were previously the manager and deputy manager of the appellant, both officers of the bank, who relied heavily on the appellant, to their detriment. They have suffered disciplinary action taken by the bank against them but I that does not make them unreliable witnesses. Vis-a-vis the evidence of SP5, SP10 and the appellant, I am convinced that SP5's and SP10's evidence should be believed and accepted. I do not think that the appellant is an honest and credible witness because of his inconsistent testimony, and in view of the fact that he amended P34A and P34B manually without informing his

superiors, SP5 and SP10.

APPEAL AGAINST SENTENCE

[93] The trial judge sentenced the appellant to four years imprisonment and two strokes of whipping.

[94] The trial judge did consider the following mitigating factors:

(a) the appellant is first offender;

(b) the appellant is married with four children who are still schooling;

(c) the appellant did not have a steady job; and

(d) the appellant had to support both his parents.

[95] The trial judge also weighed the above factors against public interest. She considered the fact that the appellant was not trustworthy in carrying out his duties as a chief cashier of the bank.

[96] I find the sentence imposed by the trial judge to be most adequate and appropriate. The appellant had abused his position as a trusted chief cashier of the bank to misappropriate the RM450,000 so ingeniously that it took more than two years for the bank to detect the offence. In the banking industry, every staff and officer has to be completely honest, above board and fully accountable for all money transactions. If the bank and its staff cannot be relied upon to keep one's money safely, then the whole purpose of depositing money in the bank is totally defeated. The RM450,000 is not a small sum, and I consider the offence committed by the appellant a very grave one for which a custodial sentence and adequate whipping have to be imposed. The sentence should serve as a deterrent not only to the appellant, but also to others in the banking industry who have been entrusted with funds by members of the public for safekeeping.

[97] Under s 408 of the Penal Code, the punishment for the offence is imprisonment of not less than one year and not more than 14 years. Whipping is mandatory but a fine is discretionary.

[98] I do not consider the sentence to be so manifestly excessive as to require this appellate court to intervene and reduce such sentence.

A **[99]** The appeal of the appellant against conviction and sentence is dismissed. The sentence is confirmed.

Appeal against conviction and sentence dismissed.

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Reported by Kanesh Sundrum

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